UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

KIMBER BALDWIN DESIGNS, LLC **c/o Minnillo & Jenkins Co., LPA** **2712 Observatory Avenue** **Cincinnati, OH 45208**	:	**CASE NO:**
	:	**JUDGE:**
individually and on behalf of all others similarly situated,	:	
Plaintiff,	:	**CLASS ACTION COMPLAINT**
vs.	:	
SILV COMMUNICATIONS, INC. **3460 Wilshire Boulevard #1103** **Los Angeles, CA 90010**	:	**(WITH JURY DEMAND)**
and	:	
JOHN DOE INDIVIDUALS/COMPANIES 1-10, Identities and Addresses currently unknown	:	
Defendants.	:	

All allegations made in this Class Action Complaint are based upon information and belief except those allegations that pertain to Plaintiff, which are based on personal knowledge. Each allegation in this Class Action Complaint either has evidentiary support or, alternatively, pursuant to Rule 11(b)(3) of the *Federal Rules of Civil Procedure*, is likely to have evidentiary support after a reasonable opportunity for further investigation or discovery. Plaintiff, individually and on behalf of all others similarly situated, for its Complaint against Defendants states as follows:

I. PRELIMINARY STATEMENT

1. Plaintiff brings this action against Defendant Silv Communications, Inc. ("Silv") for switching its long distance telephone provider without consent. Silv or its agent contacted Plaintiff purporting to verify a telephone number. Using information obtained in the call, Silv caused Plaintiff's long distance provider to be changed to Silv by falsely representing that Plaintiff had consented to the change in violation of 47 U.S.C. §§ 201(b) and 258(b) of the federal Wire or Radio Communications Act, 47 U.S.C. § 201, *et seq.* (the "Communications Act") and Title 47 of the Code of Federal Regulations. This unlawful practice is known as "slamming."

2. When Plaintiff discovered that it had been slammed and challenged Silv to provide verification of its alleged consent to switch providers, Silv provided a fabricated audio recording purporting to be verification by Plaintiff. Upon information and belief, this a standard business practice of Silv and/or its agents. Indeed, Silv has been charged with similar violations in the past and been subjected to Federal Communications Commission ("FCC") enforcement proceedings resulting in payment of at least $1,000,000 and submission to a consent decree. *See* Exhibit 1.

II. JURISDICTION AND VENUE

3. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331, 47 U.S.C. § 258, and 47 U.S.C. § 207.

4. Venue within this District is proper because the actions complained of herein occurred within the District, Plaintiff resides here, and Defendant Silv transacts business here.

III. PARTIES

5. Plaintiff Kimber Baldwin Designs, LLC, is an Ohio limited liability company that does business under the registered trade name "Fiber Optic Yarns." Plaintiff is a small business that sells yarn and knitting equipment and related materials and services. Plaintiff is owned jointly by Ms. Kimber Baldwin and Mr. Michael Baldwin. The business in managed and operated by Ms. Kimber Baldwin. Plaintiff's principal place of business is in Milford, Ohio, within this judicial district. For ease of reference, all entities shall be collectively referred to as "Plaintiff" or "Ms. Baldwin."

6. Defendant Silv Communications, Inc. is a California corporation based in Los Angeles, California and registered to do business in the State of Ohio. Upon information and belief, Silv is a provider of long distance telephone service to individuals and small businesses.

7. John Doe Defendants 1-10 are individuals and/or entities who act on behalf of and in concert with Silv to perpetrate its unlawful schemes. Further information regarding their identities will be revealed during discovery.

IV. STATEMENT OF FACTS

A. "Slamming" Violates Established Law, And There Is A Private Right of Action For Such Violations.

8. The process for properly switching consumers' long distance telephone service providers is well settled under regulations issued by the FCC under 47 CFR § 64.1120, *et seq*.

9. 47 CFR § 64.1120, *et seq.* provides that no telecommunications carrier shall submit a preferred carrier change order unless and until the order has been confirmed in accordance with one of three procedures: written or electrically signed authorization in a form that complies with "letter of agency" provision of 47 CFR § 64.1130; recorded oral authorization; or verification by an independent third party.

10. It is unlawful for an individual or business customer's long distance telephone service provider to be switched without obtaining the express consent of the customer. 47 CFR § 64.1120 et. seq.

11. A customer aggrieved of such an act is entitled to bring an action against the offending parties to recover an amount equal to 150% of all charges paid to the submitting telecommunications carrier by such subscriber after such violation, plus additional amounts as prescribed in 47 CFR § 64.1140(a) and 47 CFR § 64.1170 et, seq.

B. Silv Switched Plaintiff's Long Distance Provider Without Consent

12. Silv and/or one of the John Doe Defendants solicited Plaintiff to switch its long distance provider from Cincinnati Bell to Silv in or around July 2014.

13. At that time Plaintiff was receiving long distance service from Cincinnati Bell at a flat monthly rate that did not exceed $8.55 for any billing period.

14. Plaintiff did not authorize Silv to switch services from the existing long distance telephone provider, Cincinnati Bell.

15. Silv falsely notified Cincinnati Bell that Plaintiff had authorized a change in the long distance telephone service provider from Cincinnati Bell to Silv, thereby causing Plaintiff's long distance provider to be changed without Plaintiff's consent.

16. Silv's charges began appearing on Plaintiff's monthly Cincinnati Bell invoice on October 8, 2014. Plaintiff was charged an additional $40.94 for each billing period for "Third Party Telecom Billing" on behalf of Silv. Thus, as a direct result of Silv's unlawful activity, Plaintiff was charged $32.39 more for the same long distance service that Plaintiff had been receiving from Cincinnati Bell and with which Plaintiff was fully satisfied.

17. Silv's unlawful, excessive charges continued until at least the invoice dated March 8, 2015.

C. Silv Fabricated A Fraudulent Recording Of Plaintiff To Simulate Consent

18. Upon realizing that she had been "slammed," on or about November 18, 2014, Ms. Baldwin requested proof of verification or consent to the order to switch from Silv.

19. In response to Ms. Baldwin's request, a representative of Silv played an audio recording, allegedly of Plaintiff's employee consenting to the switch in Plaintiff's provider from Cincinnati Bell to Silv.

20. The audio recording was of a male representative of Silv rapidly rattling off a long series of questions and a female replying with a monotone "Yes."

21. The audio recording was not an accurate recording of the conversation between Plaintiff's employee and the Silv representative, but rather appeared to have been purposefully manipulated and fabricated to support Silv's contention that Plaintiff's employee consented to a change of long distance telephone provider.

22. Plaintiff's employee was not authorized to consent to a change in Plaintiff's long distance provider. Plaintiff's employee was aware of her lack of authority and declined to consent to switch long distance providers when solicited by Silv.

23. Silv was aware of this fact and caused Plaintiff's long distance provider to be switched anyway, and then prepared the audio recording purporting to confirm non-existent consent, which it played for Plaintiff when she inquired as to the authorization for the change.

24. After Plaintiff's inquiry, Silv refused to return Plaintiff to Cincinnati Bell as her long distance provider for approximately six months. Plaintiff was damaged as a direct and proximate result of Defendants' unlawful activity by, among other things, incurring unnecessary

increased monthly long distance bills, hassle, inconvenience and wasted time dealing with Silv and its agents to attempt to switch Plaintiff's long distance provider back to Cincinnati Bell.

D. Silv Engages In A Pattern And Practice Of Unlawful Activity

25. Upon information and belief, Defendant knowingly, purposefully, and willfully maintains policies and practices which flagrantly disregard FCC regulations by failing to comply or by fraudulently simulating compliance with the verification requirements set forth in 47 CFR § 64.1120, *et seq.*

26. Silv does not provide a commercially valuable service, and no informed customer would agree to authorize Silv to change their service provider. In Plaintiff's case, Silv's switch cost Plaintiff in excess of $30 more per billing period, as well as an inordinate amount of time spent by Ms. Baldwin attempting to undo the switch.

27. Silv reaped illegal profits by virtue of "slamming" Plaintiff and individuals and businesses similarly situated to it, and caused Plaintiff to pay more for its long distance service than Plaintiff was previously paying and without its consent to make the change.

28. Silv's pattern and practice of obtaining and retaining the ill-gotten profits reaped from "slamming" Plaintiff and others like it is unlawful.

29. Upon information and belief, the conduct of Silv and/or John Doe Defendants described herein is part of their standard business practices to which many other businesses and individuals have been subjected.

E. Defendants Including Silv and John Doe(s) Engage In Predicate Acts to Form RICO Liability

30. At all relevant times, Defendants (including Silv and John Doe Defendants) acquired and/or maintained, directly or indirectly, an interest or control of a Racketeer Influenced and Corrupt Organizations Act ("RICO") enterprise of individuals associated with

and, engaged in, and whose activities affected, interstate and/or foreign commerce; engaged in racketing activity as defined by 18 U.S.C. § 1961(1), constituting a pattern and practice of racketeering activity as defined in 18 U.S.C. § 1961(5), in violation of 18 U.S.C. § 1962(a-d).

31. At all relevant times, Defendants cooperated jointly and severally in the commission of two or more RICO predicate acts that are specifically prohibited by RICO statute 128 U.S.C. § 1961(1)(B) in direct violation of 18 U.S.C. § 1962(b).

32. Plaintiff further alleges that Defendants committed two or more of the offenses constituting RICO acts in a manner that was calculated and premeditated to intentionally threaten continuity (i.e. to continue their racketeering activities), in further violation of RICO law, 18 U.S.C. § 1962(b).

33. On information and belief, Defendants committed acts that constituted racketeering activity as defined by 18 U.S.C. § 1961(1)(B), including but not limited to acts that would be indictable under 18 U.S.C. § 1343 (relating to wire fraud); 18 U.S.C. § 1960(b)(1)(C)(relating to transmission of funds); and 18 U.S.C. § 1341 (mail fraud).

V. CLASS ACTION ALLEGATIONS

34. Plaintiff incorporates by reference all of the above paragraphs of this Complaint as though fully restated herein.

> Plaintiff brings this action pursuant to Fed. R. Civ. P. 23(a), 23(b)(2), and 23(b)(3) on behalf of itself and as representative of the following class (the "Class") of similarly situated businesses and individuals: All individuals and businesses switched to and billed by Silv for long distance telephone service without the verified consent at any time during the two years prior to the date of filing of this complaint and thereafter.[1]

1 Plaintiff reserves the right to refine and/or amend this definition.

35. Excluded from the Class are Defendants, their employees, any entities in which Defendants have a controlling interest, Defendants' legal representatives, heirs, successors, and assigns.

36. The names and addresses of the members of the Class should be available from Defendants and their records. Further, notice can be provided to the members of the Class by using techniques and a form of notice similar to those customarily used in class actions including individual mailed notice and notice by publication, as appropriate.

37. Although the precise number of Class members is unknown to Plaintiff, the number is, upon information and belief, sufficiently large to make joinder impractical. The disposition of each Class member's claims through the class action procedure will benefit the parties, the Court, and society as a whole.

38. Plaintiff has no conflicts of interest and has retained counsel who is competent and has experience in class actions, including consumer protection class actions.

39. Plaintiff's claims are typical of the Class member's claims. Plaintiff and the Class members have been subjected to the same policies and practices of Defendants, and have had their long distance providers changed without their consent as required by applicable law.

40. Common questions of law and fact exist as to all members of the Class and predominate over questions affecting individual members of the Class.

41. The common questions include, but are not limited to, the following:

a. Whether Silv and/or John Doe Defendants violated the verification requirements of the Communications Act by unilaterally switching business and personal consumers' long distance telephone service carrier to Silv without consent;

b. Whether Silv and/or John Doe Defendants accurately described the scope of services they would provide to prospective customers;

c. Whether Silv and/or John Doe Defendants intentionally concealed the fact they were not associated with or employed by a prospective customer's current long distance carrier;

d. Whether Silv and/or John Doe Defendants appropriately trained their sales staff to operate in compliance with all applicable state and federal regulations;

e. Whether Silv and/or John Doe Defendants accurately represented the charges associated with utilization of their services;

f. Whether Silv and/or John Doe Defendants operated a scheme to manipulate audio recordings of telephone conversations when challenged by a consumer as to whether the consumer consented to having their long distance telephone service carrier switched to Silv;

g. Whether or not Silv and/or John Doe Defendants promptly (if at all) cancelled service after being instructed by a customer to do so; and

h. Whether or not Silv and/or John Doe Defendants improperly collected charges resulting from customers whose long distance telephone service was unlawfully switched.

42. As noted above, Defendants have acted on grounds that apply generally to the Class, so that final injunctive and/or declaratory relief is appropriate respecting the Class as a whole.

43. A class action is appropriate because the common questions of law and fact enumerated above predominate over questions affecting only individual members of the Class.

44. A class action is superior to other available methods for the fair and efficient adjudication of the claims asserted in this action, as the financial interest of each individual Class member is relatively small, making it economically impracticable to pursue remedies other than by class action. As such, the Class members have little interest in individually controlling the prosecution of separate actions.

45. If individual actions were to be brought by the members of the Class, the resulting duplication of lawsuits would cause undue hardship, inefficiencies, and expense to the Court and

the litigants, and the nature of the claims is such that it is unlikely that many such claims would be pursued other than on a class basis.

46. Given the above considerations, it is desirable to concentrate the litigation of the claims in this particular forum.

47. Absent a class action, Defendants would likely retain the benefits of their wrongdoing, resulting in a miscarriage of justice.

VI. STATEMENT OF CLAIMS

COUNT ONE

VIOLATIONS OF THE WIRE OR RADIO COMMUNICATIONS ACT (47 U.S.C. § 258(a))

48. Plaintiff incorporates by reference all of the above paragraphs of this Complaint as though fully restated herein.

49. 47 U.S.C. § 258(a) states, in pertinent part, "no telecommunications carrier shall submit or execute a change in a subscriber's selection of a provider of telephone exchange service or telephone toll service except in accordance with such verification procedures as the Commission shall prescribe." "The term 'telecommunications carrier' means any provider of telecommunications services, except that such term does not include aggregators of telecommunications services (as defined in section 226 of this title). A telecommunications carrier shall be treated as a common carrier under this chapter only to the extent that it is engaged in providing telecommunications services, except that the Commission shall determine whether the provision of fixed and mobile satellite service shall be treated as common carriage." 47 U.S.C. § 153(51).

50. 47 U.S.C. § 153 (11) defines "common carrier" and "carrier" as "any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or

interstate or foreign radio transmission of energy, except where reference is made to common carriers not subject to this chapter; but a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier."

51. The FCC has prescribed that "No telecommunications carrier shall submit or execute a change on the behalf of a subscriber in the subscriber's selection of a provider of telecommunications service except in accordance with the procedures prescribed in this subpart…. (1) No submitting carrier shall submit a change on behalf of a subscriber in the subscriber's selection of a provider of telecommunications service prior to obtaining: (i) Authorization from the subscriber, and (ii) Verification of that authorization in accordance with the procedures prescribed in this section." 47 C.F.R. § 64.1120(a)

52. Defendant Silv is a "telecommunications carrier," "carrier," "submitting carrier" and/or a "common carrier" as defined above.

53. Plaintiff and members of the Class are subscribers.

54. Long distance telephone service providers are providers of telecommunications services.

55. 47 U.S.C. § 206 ("Carriers' liability for damages") provides:

> In case any common carrier shall do, or cause or permit to be done, any act, matter, or thing in this chapter prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this chapter required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this chapter, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case.

56. 47 U.S.C. § 207 provides, in pertinent part:

> Any person claiming to be damaged by any common carrier subject to the provisions of this Act may either make complaint to the Commission as hereinafter provided for, or may bring suit for the recovery of damages for

> which such common carrier may be liable under the provisions of this Act, in any district court in the United States of competent jurisdiction; but such person shall not have the right to pursue both such remedies.

57. Defendants submitted orders to change the long distance service provider of Plaintiff and other members of the Class without obtaining the required authorization and without obtaining verification of authorization, in violation of 47 C.F.R. § 64.1120, *et seq*.

58. As a direct and proximate result of Defendants' submission of long distance telephone service provider changes on behalf of Plaintiff and members of the Class's without obtaining authorization from Plaintiff or members of the Class, Plaintiff and members of the Class have suffered injuries and damages, including but not limited to payment of fees for unwanted and unnecessary long distance service.

59. Defendants are liable under 47 U.S.C. § 206 for the damages incurred by Plaintiff and Members of the Class due to Defendant's "slamming."

COUNT TWO

COMMON LAW FRAUD

60. Plaintiff incorporates by reference all of the above paragraphs of this Complaint as though fully restated herein.

61. Defendants fraudulently changed Plaintiff's and Class members' long distance telephone service carriers without authorization. Defendants then falsely represented to the existing long distance carriers that the changes had been authorized.

62. When challenged to provide verification of consent, Defendants routinely manipulated and/or fabricated audio recordings to simulate consent, and misrepresented the manipulated or fabricated recordings as actual recordings of Plaintiff and Class members.

63. Defendants' knowing and willful misrepresentations to Plaintiff and Class members caused them to believe that Defendants would honor their declination of Defendants' offer to change long distance telephone service carrier when, in fact, Defendants intended to and did change those accounts despite Plaintiff's and Class Members' declination of service.

64. Defendants' knowing and willful misrepresentations to Plaintiff and Class members caused them to believe that Defendants' fabricated or manipulated recordings were authentic when, in fact, the recordings were not authentic.

65. Defendants knew or had reason to know that its misrepresentations would cause monetary damages to Plaintiff and Class members by imposing increased costs and/or charges on Plaintiff and Class members.

66. Plaintiff and Class members relied on the Defendants' false representations to Plaintiff's and Class members' detriment.

67. Plaintiff's and Class members' reliance on Defendants' misrepresentations was reasonable and justified.

68. As a direct result of Defendants' fraudulent actions, omissions, and misrepresentations, Plaintiff and Class members have suffered damages.

69. Defendants acted with deliberate purpose in harming Plaintiff and Class members and are therefore liable to Plaintiff and Class members.

COUNT THREE

CIVIL RICO CONSPIRACY – ACQUISITION AND MAINTENANCE OF AN INTEREST IN AND CONTROL OF AN ENTERPRISE ENGAGED IN A PATTERN OF RACKETEERING ACTIVITY

70. Plaintiff incorporates by reference all paragraphs of this Complaint as though fully stated herein.

71. At all relevant times, Defendants acquired and/or maintained, directly or indirectly, an interest or control of a RICO enterprise of companies and/or individuals who were associated with and engaged in, and whose activities did affect, interstate and foreign commerce.

72. At all relevant times, Defendants cooperated jointly and severally in the commission of two or more RICO predicate acts listed in 18 U.S.C. § 1961(1)(B) and did so in violation of the RICO statute at 18 U.S.C. §§ 1962(a), (b).

73. Plaintiff further alleges that all Defendants committed two or more of the offenses itemized above in a manner which they calculated and premeditated intentionally to threaten continuity (i.e. a continuing threat of their respective racketeering activities), also in violation of the RICO statute enumerated at 18 U.S.C. § 1962(b).

COUNT FOUR

CIVIL RICO CONSPIRACY – CONDUCT AND PARTICIPATION IN A RICO ENTERPRISE THROUGH A PATTERN OF RACKETEERING ACTIVITY

74. Plaintiff incorporates by reference all paragraphs of this Complaint as though fully stated herein.

75. At all relevant times, Defendants associated with a RICO enterprise of individuals who were associated and engaged in, and whose activities did affect interstate and/or foreign commerce.

76. All Defendants conducted and/or participated, either directly or indirectly, in the conduct of the affairs of the RICO enterprise through a pattern of racketeering activity in violation of 18 U.S.C §§ 1961(1), (4), (5), (9) and 1962(c).

77. During all relevant times, Defendants cooperated jointly and severally in the commission of two or more RICO predicate acts that are itemized in 18 U.S.C. § 1961(1)(B), and did so in violation of 18 U.S.C. § 1962(b-c).

78. Plaintiff further alleges that Defendants committed two or more of the offenses itemized above in a manner which they calculated and premeditated intentionally to threaten continuity (i.e. a continuing threat of their respective racketeering activities), also in violation of 18 U.S.C. § 1962(c).

COUNT FIVE

CIVIL RICO CONSPIRACY – CONSPIRACY TO ENGAGE IN A PATTERN OF RACKETEERING ACTIVITY

79. Plaintiff incorporates by reference all paragraphs of this Complaint as though fully stated herein.

80. At all relevant times, Defendants conspired to acquire and maintain an interest in a RICO enterprise engaged in a pattern of racketeering activity, in violation of 18 U.S.C. §§ 1962(b) and (d).

81. At all relevant times, Defendants also conspired to conduct and participate in said RICO enterprise through a pattern of racketeering activity, in violation of 18 U.S.C. §§ 1962(c) and (d) and 18 U.S.C. §§ 1961(1), (4), (5) and (9).

82. During all relevant times, Defendants cooperated jointly and severally in the commission of two or more predicate acts that are itemized at 18 U.S.C. § 1961(1)(B), in violation of 18 U.S.C. § 1962(d).

83. Plaintiff further alleges that Defendants committed two or more of the offenses itemized above in a manner which they calculated and premeditated intentionally to threaten continuity (i.e. a continuing threat of their respective racketeering activities), also in violation of 18 U.S.C. § 1962(d).

PRAYER FOR RELIEF

WHEREFORE, Plaintiff and all other similarly situated Class members request judgment against the Defendants as follows:

1. For an Order certifying this action as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure and appointing counsel for Plaintiff as Class Counsel;

2. Declaratory judgment that Defendants' conduct violated 47 U.S.C. § 258a. *et seq*., and injunctive relief as to Defendants' practice of "slamming";

3. For an award of actual and statutory damages to Plaintiff and Class against Defendants pursuant to 47 U.S.C. § 207 and 47 CFR § 64.1140;

4. For an award of all relief available under 18 U.S.C. §§ 1964(a) and (c);

5. For an award of compensatory and punitive damages;

6. For an award of reasonable attorney's fees and costs; and

7. Such other relief as in law and equity is appropriate under the premises.

Respectfully submitted,

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JURY DEMAND

Plaintiff demands a trial by jury as to all issues so triable in this matter.

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